(2)

Supreme Court, U.S.
FILED
MAR 13 2002
CLERK

No. 01-1154

IN THE

Supreme Court of the United States

REALTY ONE, INC.,

Petitioner,

v.

RE/MAX INTERNATIONAL, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Of counsel:

JOHN R. LINTON
RE/MAX INTERNATIONAL, INC.
8390 East Crescent Pkwy.
Suite 600
Greenwood Village, CO 80111
(303) 796-3609

TERRENCE R. QUINN
QUINN, DAY & BARKER
P.O. Box 9335
4200 Beach Drive
Rapid City, SD 57709
(605) 343-6400

EDWARD W. COCHRAN
COCHRAN & COCHRAN
2827 Boxton
Shaker Heights, OH 44120
(216) 751-5546

STEPHEN J. SQUERI
MARK J. ANDREINI
CHARLES M. KENNEDY
JONES, DAY, REAVIS, & POGUE
North Point
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939

DANIEL H. BROMBERG
(*Counsel of Record*)
MATTHEW S. DUCHESNE
JONES, DAY, REAVIS, & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Respondents

7588

QUESTION PRESENTED

Whether the district court erred in exercising ancillary jurisdiction to enforce a settlement where the order dismissing the underlying case retained jurisdiction to issue superseding orders "setting forth different terms and conditions relative to the settlement" and the district court found that its order was intended to retain jurisdiction over enforcement of the settlement.

CORPORATE DISCLOSURE STATEMENT

The respondents in this matter are:

RE/MAX International, Inc.; A.E.B.T.S., Inc. d/b/a RE/MAX Crossroads Properties; T.M.A.T.N.B., Inc. d/b/a RE/MAX Affinity, Inc.; D.F.I., Inc. d/b/a RE/MAX Results; Joseph P. Grandy, Inc. d/b/a RE/MAX Xpress; McGrew Realty, Inc. d/b/a RE/MAX Key Realty; Property Professionals, Inc. d/b/a RE/MAX Property Professionals; RE/MAX Advantage, Inc. d/b/a RE/MAX Advantage; RE/MAX Northeast Ohio Limited Partnership; Zames Realty, Inc. d/b/a RE/MAX Specialists in Real Estate; Realty Properties, Inc. d/b/a RE/MAX Realty Properties; True Independence Partnership d/b/a RE/MAX Independent Associates; and R.E.P., Inc. d/b/a RE/MAX Realty.

Respondents are all privately held companies, and none has any publically held subsidiaries or affiliates.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 2

REASONS FOR DENYING THE WRIT 7

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991) 11
Bell v. Schexnayder, 36 F.3d 447 (5th Cir. 1994) 6
In re Bond, 254 F.3d 669 (7th Cir. 2001) 6
Caudill v. N. Am. Media Corp., 200 F.3d 914 (6th Cir. 2000) 6, 8
Ford v. Neese, 119 F.3d 560 (7th Cir. 1997) 6
Hagestad v. Tragesser, 49 F.3d 1430 (9th Cir. 1995) .. 6, 8
Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994) ..... *passim*
Lucille v. City of Chicago, 31 F.3d 546 (7th Cir. 1994) 8
McAlpin v. Lexington 76 Auto Truck Stop, Inc., 229 F.3d 491 (6th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001) 6, 8
Miener v. Missouri Dep't of Mental Health, 62 F.3d, 1126 (8th Cir. 1995) 8
Morris v. City of Hobart, 39 F.3d 1105 (10th Cir. 1994) 8
Nat'l Presto Indus., Inc. v. Dazey Corp., 107 F.3d 1576 (Fed. Cir. 1997) 8
In re Phar-Mor, Inc. Sec. Litig., 172 F.3d 270 (3d Cir. 1999) 8, 10
Scelsa v. City Univ. of N.Y., 76 F.3d 37 (2d Cir. 1996) 6, 7, 8, 10

Rules

Fed. R. Civ. P. 41(a) 12

TABLE OF AUTHORITIES
(continued)

Miscellaneous

VI Phillip E. Areeda, *Antitrust Law* § 1410 (1986) 3
Robert Stern *et al.*, *Supreme Court Practice*
§ 4.17 (7th ed. 1993) 10

Respondents RE/MAX International, Inc. *et al.* (collectively, "RE/MAX") respectfully submit this brief in opposition to the petition for a writ of certiorari in this case.

INTRODUCTION

In the proceedings below, after extensive negotiations mediated by the district court, the parties agreed on the record to settle their claims and to reduce the terms of that settlement to writing within forty-five days. The next day, the district court *sua sponte* issued a dismissal order that expressly retained jurisdiction to issue subsequent orders "setting forth different terms and conditions relative to the settlement and dismissal of the within action." Pet. App. 67a. Interpreting this reservation of jurisdiction to cover enforcement of the settlement, both the district court and the court of appeals concluded that the district court had jurisdiction under this Court's decision in *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994), to remedy petitioner Realty One's breach of the settlement. This ruling does not warrant further review.

Realty One has not shown that this question merits the attention of this Court. Contrary to Realty One's assertions, there is no conflict between the holding below and those of other courts of appeals; indeed, Realty One has failed to identify any other case involving a dismissal order with a similar reservation of authority. There is also no conflict between the decision below and *Kokkonen* because *Kokkonen* did not address the proper method for construing the scope of a reservation of authority and because the decision below correctly held that the dismissal order retained authority to remedy Realty One's breach of the settlement. Finally, these issues—and the question presented—have been mooted by a concession in the petition.

STATEMENT

1. Respondent RE/MAX International, Inc. franchises an innovative and highly successful real estate brokerage system, which attracts experienced real estate agents by offering them a greater percentage of commissions than traditional real estate brokers pay. Resp. App. 4a-5a. Petitioner Realty One, a traditional real estate broker, is the largest broker in Northeast Ohio in terms of market share. Resp. App. 8a. When RE/MAX International sought to enter Northeast Ohio, Realty One and Smythe Cramer, Inc., the second largest broker in the area, responded by repeatedly and "almost simultaneously" over the course of a thirteen-year period imposing "adverse commission splits" on RE/MAX franchisees. Resp. App. 11a-12a. Under this adverse-split policy, in cooperative transactions involving their listings, both Realty One and Smythe Cramer reduced the share of commissions paid to RE/MAX brokers well below the share customarily and almost uniformly paid to other brokers. Resp. App. 4a, 9a-12a.

When RE/MAX uncovered direct evidence that Realty One and Smythe Cramer had imposed the adverse splits as part of a conspiracy to prevent it from entering Northeast Ohio, Resp. App. 25a, it sued them for violations of state and federal antitrust laws. During discovery, RE/MAX developed further evidence of an illegal conspiracy, including expert testimony that it would have been economically irrational for Realty One and Smythe Cramer to impose adverse splits against RE/MAX franchisees for any substantial period absent an agreement between them. Resp. App. 22a-25a. Although the district court found this and other evidence of a conspiracy insufficient to create a genuine issue of material fact, the court of appeals disagreed and remanded the case for trial. *Id.* at 26a-27a.

In the first phase of the trial, the jury found that Realty One had, in fact, agreed with Smythe Cramer to impose adverse

splits on RE/MAX franchisees. Pet. App. 4a. Later, however, the trial judge *sua sponte* determined that the jury had misunderstood an earlier instruction and declared a mistrial.[1] *Id.*; J.A. 1735-44.

2. The case was subsequently transferred to a new judge, who successfully mediated a settlement between RE/MAX and Smythe Cramer. Pet. App. 5a. On July 13, 2000, the general terms of the settlement were read into the record, Pet. App. 69a-73a, and RE/MAX and Smythe Cramer agreed to delay the effectiveness of the agreement for 45 days so that they could "complete the written agreement." Pet. App. 71a-73a.

As the district court began to schedule a new trial on the claims against Realty One, Realty One announced that it would agree to settle the case on the same terms as Smythe Cramer, with the sole exception that Realty One would pay RE/MAX nearly twice as much as Smythe Cramer had agreed to pay. Pet. App. 7a & n.3. In so doing, Realty One promised to "draft the papers in the same time period." Pet. App. 7a n.3, 74a. Several days later, in a press release and a company newsletter, Realty One confirmed that the settlement contemplated a more formal, detailed, written agreement. Pet. App. 8a.

3. On July 14, 2000, the day after the settlement was reached, the district court *sua sponte* ordered:

> that the docket be marked, "settled and dismissed with prejudice".

---

[1] The district court judge determined that the instruction, which was drawn from an ABA model instruction, had allowed the jury to find an illegal conspiracy based on an agreement to continue the adverse splits after they had been imposed unilaterally. J.A. 1735-38. In fact, however, such agreements can constitute illegal conspiracies under the antitrust laws. *See, e.g.*, VI Phillip E. Areeda, *Antitrust Law* § 1410, at 67 (1986).

> FURTHER, Any subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order.

Pet. App. 67a.

4. Eleven days later, RE/MAX sent both Smythe Cramer and Realty One written drafts memorializing their respective settlements. Pet. App. 8a. Smythe Cramer thereafter worked with RE/MAX to finalize both the written language and the non-essential details of their agreement. Realty One, however, refused to respond to RE/MAX's draft for weeks and then denied that it was under any obligation to enter into a formal written agreement at all. Pet. App. 8a-11a.

As the settlement's 45-day deadline for producing a written document approached, RE/MAX requested a status conference with the district court because of Realty One's refusal to negotiate over the document. At the conclusion of the conference, the court instructed the parties to continue negotiating during the upcoming Labor Day weekend and directed RE/MAX to file a motion to enforce the following Tuesday if an agreement was not reached by then. Pet. App. 12a. Realty One frustrated these negotiations by, among other things, failing to explain any of its concerns with RE/MAX's draft until Monday (Labor Day) night and waiting until then to propose a lengthy and substantially different alternative draft. *Id.*

5. RE/MAX moved to enforce the next day. Although neither party requested an evidentiary hearing, Pet. App. 12a-13a, both RE/MAX and Realty One provided the district court with multiple written submissions in connection with the motion to enforce. *See* J.A. 727-33, 1006-16, 1243-69, 1403-25, 1512-25.

Realty One argued that the district court lacked jurisdiction to enforce the settlement because its July 14 order had neither

incorporated the terms of the settlement nor included a provision retaining jurisdiction over it. The district court disagreed. Noting that its July 14 dismissal order "expressly reserved the right to make further orders regarding the settlement agreement," the district court held that the order contained "a clear reservation . . . of jurisdiction over matters concerning the settlement agreement," including "the enforcement of the settlement agreement." Pet. App. 46a.

The district court also found that Realty One had breached the settlement recited before the district court by "failing to agree upon" the written terms of the agreement. Pet. App. 46a-48a. To remedy this breach, the district court entered an order setting forth the terms of the agreement, which were drawn from the transcript of the July settlement conference, Realty One's objections to terms proposed by RE/MAX, and terms to which Smythe Cramer agreed. Pet. App. 27a-34a, 49a-66a.

6. When Realty One appealed, the court of appeals affirmed. It found that the district court had jurisdiction to enforce the settlement under this Court's decision in *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994). The court of appeals also observed that under *Kokkonen* jurisdiction to enforce a settlement may be retained after dismissal by making compliance with the settlement part of the dismissal order and that *Kokkonen* recognized two ways of doing so: "either by separate provision (*such as a provision 'retaining jurisdiction'* over the settlement agreement) or by incorporating the terms of the settlement agreement in the order." Pet. App. 15a (quoting *Kokkonen*, 511 U.S. at 381) (emphasis in court of appeals opinion). Because the July 14 dismissal order expressly reserved authority to issue "any 'subsequent order[s] setting forth different terms and conditions relative to the settlement and dismissal of the within action,'" Pet. App. 23a, the court of appeals held that jurisdiction over enforcement of the settlement had been retained. A court, it reasoned, "may only enter subsequent

orders involving the settlement agreement if it has retained jurisdiction." *Id.*

In so doing, the court of appeals noted that other circuits had found jurisdiction retained over settlement agreements based on limited reservations of jurisdiction. Pet. App. 19a-20a (citing *Bell v. Schexnayder*, 36 F.3d 447, 448 (5th Cir. 1994); *Ford v. Neese*, 119 F.3d 560, 561-62 (7th Cir. 1997); *In re Bond*, 254 F.3d 669 (7th Cir. 2001)). The court also distinguished its prior decisions in *Caudill v. North America Media Corp.*, 200 F.3d 914 (6th Cir. 2000), and *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491 (6th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001)), on the ground that those decisions dealt with the incorporation of settlement terms into a dismissal order, rather than provisions retaining jurisdiction. Pet. 17a-18a. For similar reasons, the lower court also distinguished the Second Circuit's decision in *Scelsa v. City University of New York*, 76 F.3d 37 (2d Cir. 1996), and the Ninth Circuit's decision in *Hagestad v. Tragesser*, 49 F.3d 1430 (9th Cir. 1995). Pet. App. 20a-21a.

Finding that the parties had entered into a valid, binding settlement, the court of appeals affirmed that Realty One had breached the settlement when it "stubbornly refused to cooperate" in negotiating the details of the written agreement. Pet. App. 26a. The court also affirmed the remedy imposed by the district court on the ground that Realty One had "failed to point to any material differences" between the terms of that remedy and the terms of the oral settlement. Pet. App. 27a-34a.

Judge Wallace dissented. Although he did not find that the majority's opinion conflicted with *Scelsa* or any decision of another circuit, he disagreed with the opinion on the merits. While he found that the district court had retained jurisdiction over the settlement, he concluded that the dismissal order retained only "authority to *alter* the terms of the settlement agreement not the authority to *enforce* it." Pet App. 35a

(emphasis in original). In his view, the district court's interpretation of its order was irrelevant because the scope of the reservation was "clear on the face of the order." Pet. App. 35a-36a, 39a.

REASONS FOR DENYING THE WRIT

This case does not warrant further review. The issue upon which Realty One seeks review turns upon application of the Court's decision in *Kokkonen* to a singularly worded dismissal order that indisputably reserved at least some authority over the parties' settlement. As neither *Kokkonen* nor any other case cited by petitioner has construed a similarly worded reservation of authority, the decision below does not create any conflict among the circuits or with this Court's decision in *Kokkonen*. Moreover, the decision below is also correct and, in any event, supported by alternative grounds. As a consequence, this case does not merit the attention of this Court.

1. Although Realty One asserts (Pet. 14) that the decision below conflicts with "[e]very other circuit court which has considered the issue presented here," it fails to cite a single case involving a reservation of jurisdiction similar to the one in the July 14 dismissal order.

The only supposedly conflicting case that Realty One describes is the Second Circuit's decision in *Scelsa v. City University of New York*, 76 F.3d 37 (2d Cir. 1996). In that case, however, there was no reservation of authority over settlement. The dismissal order at issue in *Scelsa* simply stated that the case was "dismissed with prejudice and without costs to any party, except as set forth in the Settlement Agreement among the parties dated January 7, 1994." *Id.* at 39-40. As the decision below recognized, this order "could in no way be construed as expressing an intent to retain jurisdiction." Pet. App. 22a n.13; *accord Scelsa*, 76 F.3d at 41. Thus, although *Scelsa* contains some stray language that petitioners find beneficial, *see Scelsa*, 76 F.3d at 42 (noting

that the trial judge "did not *expressly* state that she had not intended to retain jurisdiction over the Agreement") (emphasis added); *id.* at 41 (noting that the order does not "*expressly* retain [] jurisdiction") (emphasis added), it clearly does not create the sort of square conflict usually required for certiorari. *Cf. Kokkonen*, 511 U.S. at 379 ("It is to the holdings of our cases, rather than their dicta, that we must attend. . . .").

The other cases cited by Realty One (Pet. 14-15) are also easily distinguishable. The dismissal orders in four of the six supposedly conflicting circuit court decisions cited by Realty One do not contain any reservations of authority,[2] and the orders in the two remaining cases reserve authority to reopen the underlying lawsuits, *see Hagestad v. Tragesser*, 49 F.3d 1430, 1432 (9th Cir. 1995); *Morris v. City of Hobart*, 39 F.3d 1105, 1108 n.1 (10th Cir. 1994), an authority distinct from that needed to enforce a settlement. *See Kokkonen*, 511 U.S. at 378. Petitioners' reliance on prior Sixth Circuit precedent (Pet. at 15-17) is similarly misplaced because intra-circuit conflicts are not relevant for purposes of certiorari. In addition, as the decision below recognized, Pet. App. 16a-18a & n.7, those cases are readily distinguishable because the dismissal orders in them simply mention that there was a settlement.[3]

---

[2] *See In re Phar-Mor, Inc. Sec. Litig.*, 172 F.3d 270, 274 (3d Cir. 1999) (simply noting that dismissal was "pursuant to the terms of the Settlement"); *Nat'l Presto Indus., Inc. v. Dazey Corp.* 107 F.3d 1576, 1583 (Fed. Cir. 1997) (not even mentioning settlement); *Miener v. Missouri Dep't of Mental Health*, 62 F.3d, 1126, 1127-28 (8th Cir. 1995) (same); *Lucille v. City of Chicago*, 31 F.3d 546, 548 (7th Cir. 1994) (order "containing some but not all of the terms of the settlement agreement").

[3] *See McAlpin*, 229 F.3d at 497 (mentioning that "the parties . . . . have settled their dispute" and ordering the file "DISMISSED AS SETTLED WITH PREJUDICE AS TO ALL CLAIMS"); *Caudill*, 200 F.3d at 915 n.1 (dismissing "[p]ursuant to the terms of the parties' October 1, 1991 settlement agreement").

Thus, none of the cases cited by Realty One involves a reservation of authority to modify the terms of a settlement, and therefore they do not even begin to show the sort of square conflict this Court normally requires for certiorari.

2. Realty One's attempt to show a conflict with this Court's decision in *Kokkonen* (Pet. 10-13) fails for similar reasons. *Kokkonen* considered a dismissal order that "did not so much as refer to the settlement agreement." 511 U.S. at 377. Consequently, in *Kokkonen*, the Court had no occasion to consider whether an order retaining authority to alter or amend the terms of a settlement can be construed to retain authority over the enforcement of that settlement. Indeed *Kokkonen* did not even address the type of language or level of specificity required to exercise ancillary jurisdiction over the enforcement of a settlement based upon a provision retaining jurisdiction over the settlement. Thus, there is no conflict between *Kokkonen* and the decision below.

3. Even apart from its failure to show any conflict among the circuits or with this Court, Realty One has not shown that this case presents a question warranting the Court's attention. It has not demonstrated that the question presented is a recurring one; to the contrary, as demonstrated above, Realty One fails to point to a single case with an analogous reservation of authority. Nor has it shown that the question presented is an important one. Realty One argues (Pet. 23-24) that the decision below will discourage settlements because the district court imposed written terms on it. The petition, however, asks this Court to review the lower court's ruling on subject matter jurisdiction, not the remedy that it imposed (which was necessary to prevent Realty One from benefitting from its refusal to honor the settlement it adopted to avoid an imminent trial and thus necessary to maintain confidence in, and respect for, such agreements in the future). Realty One also argues (Pet. 22-23) that this case is important because it concerns limitations on subject matter jurisdiction and the authoritative nature of this Court's decisions. This contention,

however, boils down to nothing more than a claim that the lower court incorrectly applied the principles recognized in *Kokkonen* to the unusual reservation of authority in this case, which is an insufficient basis for certiorari because this Court is not in the business of mere error correction. *See e.g.*, Robert Stern *et al.*, *Supreme Court Practice* § 4.17 at 193 (7th ed. 1993).

4. In any event, the decision below was correct. In its July 14 dismissal order, the district court stated that "[a]ny subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order." Pet. App. 67a. As this order reserves authority to issue subsequent orders altering the terms and conditions of the settlement, it is plainly intended to retain some jurisdiction over the settlement. Moreover, the district court issuing the order found that it was intended to retain jurisdiction "over matters concerning the settlement agreement," including "the enforcement of the settlement agreement." Pet. App. 46a. This finding deserves deference because, as petitioner's own authority recognizes, the district court is "in the best position to determine whether it intended to retain jurisdiction over enforcement of the settlement." *In re Phar-Mor*, 172 F.3d at 275; *see also Scelsa*, 76 F.3d at 42 ("[T]here are few persons in a better position to understand the meaning of an order of dismissal than the district judge who ordered it."). Indeed, as the court of appeals observed, the district court could "only enter subsequent orders involving the settlement agreement if it has retained jurisdiction." Pet. App. 23a. Thus, the district court's construction of its July 14 dismissal order should be respected.

In arguing to the contrary, Realty One does not point out any flaws in the district court's construction of its order or the court of appeals' reasoning. Indeed, notably absent from the petition and from Realty One's briefs in the court of appeals below is any attempt to offer an alternative reading of the dismissal order. Realty One argues (Pet. 19-22) that a district

court cannot exercise jurisdiction over the enforcement of a settlement agreement if there is any ambiguity or uncertainty in the reservation of jurisdiction. A clear statement rule is, however, strong medicine, *see, e.g.*, *Astoria Fed. Savs. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991), and Realty One does not even begin to show that such a rule is appropriate here. Realty One claims (Pet. 19) to derive this requirement from *Kokkonen*, which is plainly incorrect because, as noted above, *Kokkonen* did not have occasion to consider the issue. *See supra* p. 9. Indeed, the clear statement rule is incompatible with *Kokkonen*'s observation that a court may make compliance with a settlement agreement part of a dismissal order implicitly by "retaining jurisdiction" over the order. *See Kokkonen*, 511 U.S. at 381. Thus, Realty One's position has no basis.

Nor is Realty One saved by the dissent's conclusion that the July 14 dismissal order reserved authority to alter the terms of the settlement but not to enforce it. *See* Pet. App. 35a. In the first place, Realty One has not adopted this interpretation; to the contrary, Realty One claims (Pet. 21) the reservation is "ambiguous." In addition, under the dissent's interpretation, the reservation in the July 14 dismissal order would still authorize the enforcement order issued by the district court.

By its terms, the enforcement order falls squarely within the scope of the July 14 dismissal order's reservation because it sets forth "terms and conditions relative to the settlement." Pet. App. 67a. Even more fundamentally, in retaining authority to issue orders altering the terms of the settlement, the July 14 dismissal order reserved the ability to incorporate into a later order the terms and conditions developed in the process of memorializing the settlement. By refusing to participate in that process, Realty One undermined the district court's ability to exercise that authority, thereby invoking the district court's ancillary jurisdiction to "manage its proceedings [and] vindicate its authority." *Kokkonen*, 511 U.S. at 380. Thus, even under the dissent's narrow construction,

the July 14 dismissal order afforded the district court jurisdiction over the particular breach of contract considered below.

5. This case is a poor vehicle for considering the question presented because Realty One's petition makes a concession that moots that question.

As Realty One points out (Pet. App. 79a), RE/MAX argued in the lower court that the July 14 dismissal order should be treated as an administrative closing because the district court lacked authority to dismiss the case unconditionally under Federal Rule of Civil Procedure 41(a)(2), which authorizes courts to order the dismissal of a case "at the plaintiff's instance." Fed. R. Civ. P. 41(a)(2). Although the court of appeals found that the dismissal was pursuant to that Rule, Pet. App. 8a, Realty One now concedes (Pet. 21) that there was "no motion in the record by the plaintiffs as required by Rule 41(a)(2)" and that therefore there was no dismissal under Rule 41(a)(2).

Although Realty One asserts (Pet. 21) that dismissal was nonetheless appropriate under Rule 41(a)(1), that is incorrect. Rule 41(a)(1) permits a plaintiff to dismiss a case after the filing of an answer only "by filing a stipulation of dismissal signed by all parties who have appeared in the action." Fed. R. Civ. P. 41(a)(1). Realty One does not—and cannot—point to any such stipulation; instead, it incorrectly argues (Pet. 21) that the settlement read into the record on July 13 effected the required stipulation. In addition, even if an oral settlement could act as a stipulation under Rule 41(a)(1), the settlement here would not have authorized the district court to dismiss the case on July 14 because that settlement was not to go into effect until 45 days later while the parties worked out the details of a written agreement. Pet. App. 72a-73a. As a consequence, the order issued by the district court on July 14 could only have effected an administrative closing, not a dismissal under Rule 41 depriving the district court of subject

matter jurisdiction over enforcement of the settlement. Thus, this case does not even squarely present the question whether the reservation in that order retained jurisdiction to enforce the settlement.

* * *

In sum, this case does not merit this Court's attention because the Sixth Circuit's decision below does not conflict with either the decisions of this Court or the decisions of other courts of appeals. Indeed, Realty One has failed to cite a single case involving an analogous reservation of authority. As the decision below also correctly applied this Court's decision in *Kokkonen* to the unusual reservation before it and is justifiable on independent grounds as well, no further review is warranted.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

Of counsel:

JOHN R. LINTON
RE/MAX INTERNATIONAL, INC.
8390 East Crescent Pkwy.
Suite 600
Greenwood Village, CO 80111
(303) 796-3609

TERRENCE R. QUINN
QUINN, DAY & BARKER
P.O. Box 9335
4200 Beach Drive
Rapid City, SD 57709
(605) 343-6400

EDWARD W. COCHRAN
COCHRAN & COCHRAN
2827 Boxton
Shaker Heights, OH 44120
(216) 751-5546

STEPHEN J. SQUERI
MARK J. ANDREINI
CHARLES M. KENNEDY
JONES, DAY, REAVIS, & POGUE
North Point
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939

DANIEL H. BROMBERG
(*Counsel of Record*)
MATTHEW S. DUCHESNE
JONES, DAY, REAVIS, & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Respondents